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Removing Temptation: Per Se Reversal for Judicial Indication of Belief in the Defendant's Guilt

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REMOVING TEMPTATION: PER SE REVERSAL FOR JUDICIAL INDICATION OF BELIEF IN THE DEFENDANT'S GUILT

INTRODUCTION

In 1930, Harry Murdock was tried in United States District Court for the Southern District of Illinois for violations of the Revenue Acts of 1926 and 1928.[1] In his charge to the jury, the judge expressed his opinion that the defendant was "guilty in manner and form as charged beyond a reasonable doubt."[2] Not surprisingly, Murdock was convicted.[3] The Court of Appeals for the Seventh Circuit reversed the conviction[4] and the Supreme Court affirmed on numerous grounds, including a finding of error in the judge's charge.[5] The Court held that although federal judges have great power to comment on the evidence at trial, they must leave the ultimate factual determinations to the jury.[6] The Court acknowledged the power of the judge to express an opinion as to the defendant's guilt, but limited this authority to the most extreme cases, such as when the evidence of the defendant's guilt is almost undisputed.[7]

Nearly forty years later, James Davis was tried in San Francisco Superior Court for first degree robbery and assault with intent to commit murder.[8] The trial judge charged the jury that in his opinion "the guilt of the Defendant . . . has been proved beyond reasonable doubt."[9] Davis was found guilty and the California Court of Appeal affirmed his conviction.[10] The United States District Court for the Northern District of California issued Davis a writ of habeas corpus,[11] but the Ninth Circuit, hearing the case en banc in order to clarify a previous holding in a simi-

1. *See* Murdock v. United States, 62 F.2d 926 (7th Cir. 1932), *aff'd*, 290 U.S. 389 (1933).

2. United States v. Murdock, 290 U.S. 389, 393 (1933).

3. *See id.* at 391.

4. *See Murdock*, 62 F.2d at 928.

5. *See Murdock*, 290 U.S. at 394.

6. *See id.*

7. *See id.* The Court cited Horning v. District of Columbia, 254 U.S. 135 (1920), as one such exceptional case. Justice Holmes, writing for the Court in *Horning*, allowed a federal judge to indicate his belief in the defendant's guilt because "upon the undisputed evidence the defendant was guilty." *Id.* at 137. Justice Brandeis, however, writing for three of four dissenting justices, believed that the use of the instruction at issue was an unacceptable coercion of the jury and a usurpation of the jury's role. *See id.* at 139 (Brandeis, J., dissenting).

8. *See* Davis v. Craven, 485 F.2d 1138, 1139 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974); People v. Davis, 260 Cal. App. 2d 211, 67 Cal. Rptr. 35, *cert. denied*, 393 U.S. 890 (1968).

9. *Davis*, 485 F.2d at 1139.

10. *See* People v. Davis, 260 Cal. App. 2d 211, 217, 67 Cal. Rptr. 35, 39, *cert. denied*, 393 U.S. 890 (1968).

11. Davis v. Craven, No. C-70 1234 AJZ, slip op. at 5 (N.D. Cal. Aug. 20, 1971), *rev'd*, 485 F.2d 1138 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974).

lar case, reversed the issuance by a vote of seven to five.[12]

What can explain these seemingly incongruous results? *Murdock* involved a federal trial appealed through direct review.[13] *Davis*, however, originally involved a state trial and entered the federal system on collateral appeal through the habeas corpus process.[14] The court of appeals in *Davis* did not regard the holding in *Murdock* as one of constitutional magnitude and therefore found habeas corpus relief to be unavailable.[15] Because the *Murdock* Court did not state that its holding was based on constitutional grounds,[16] the *Davis* court apparently read *Murdock* as establishing only a procedural rule for federal trial courts, not a constitutional mandate.

Federal appeals courts exercise supervisory power over the administration of criminal justice in federal district courts and therefore can establish standards for trial court procedure separate from those mandated by the Constitution.[17] When a federal appellate court finds a district court's

12. *See Davis*, 485 F.2d at 1140, 1142. The Ninth Circuit was attempting to clarify the holding in Gonsior v. Craven, 449 F.2d 20 (9th Cir. 1971).

13. *See* United States v. Murdock, 290 U.S. 389, 391 (1933). Direct review refers to the review by a higher court of a lower court's final decision. The courts of appeals are authorized to review final decisions of district courts. *See* 28 U.S.C. § 1291 (1982). The Supreme Court, pursuant to 28 U.S.C. § 1254(1) (1982), may issue a writ of certiorari in order to review the decision of a court of appeals. Direct review may be contrasted with the collateral attack of habeas corpus whereby a federal court reviews the final decision of a state court. The power of federal courts to issue a writ of habeas corpus to prisoners in state custody is currently authorized by 28 U.S.C. §§ 2241-2254 (1982). For a general treatment of the long and varied history of the writ of habeas corpus, see J. Cook, Constitutional Rights of the Accused: Post Trial Rights, §§ 86-126 (1976); D. Wilkes, Federal and State Postconviction Remedies and Relief §§ 2-1 to -4, 3-1 to -2, 5-1 to -12, 8-1 to -54 (1983); C. Wright, The Law of Federal Courts § 53 (4th ed. 1983); L. Yackle, Postconviction Remedies §§ 2-6, 15-21 (1981 & Supp. 1985); Note, *Federal Habeas Corpus Review of State Forfeitures Resulting From Assigned Counsel's Refusal to Raise Issues on Appeal*, 52 Fordham L. Rev. 850, 850-51 nn.1-3 (1984).

14. *See* Davis v. Craven, 485 F.2d 1138, 1139 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974).

15. *See id.* at 1139-41.

16. *See Murdock*, 290 U.S. at 393-94.

17. *See* United States v. Hasting, 461 U.S. 499, 505 (1983) (federal courts may formulate procedural rules not required by the Constitution or Congress); United States v. Payner, 447 U.S. 727, 733 (1980) (recognizing the use of federal supervisory power); Cupp v. Naughten, 414 U.S. 141, 146 (1973) (appellate courts may "require [trial courts] to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution"); McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies . . . establishing and maintaining civilized standards of procedure and evidence."); Daye v. Attorney Gen., 712 F.2d 1566, 1570-71 (2d Cir. 1983) (recognizing the "stricter standard" of the supervisory power), *cert. denied*, 104 S. Ct. 723 (1984); 18 U.S.C. §§ 3771-3772 (1982) (Supreme Court has power to establish rules governing criminal procedure prior to, including and after the verdict.); 28 U.S.C. § 2071 (1982) ("Supreme Court and all courts established by Act of Congress" may establish rules of conduct); Fed. R. App. P. 47 (courts of appeals may establish rules governing their practice). *But see* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1434-35 (1984) (arguing that current use of federal supervisory power is over-

practice to be unacceptable, it can use its supervisory power to reverse the conviction, thereby avoiding the issue of whether the challenged procedure violates the Constitution.[18] In reviewing state court trials, however, federal courts are barred by principles of federalism from establishing procedural standards for the states separate from those compelled by the Constitution.[19] Federal courts could reform state practices by raising rules of procedure to a constitutional level,[20] but they are understandably reluctant to intrude on state procedures in this manner.[21]

The desire to avoid reaching the question of constitutionality may have

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broad and concluding that "the concept of supervisory power should be abandoned in favor of identifying more specifically the constitutional or statutory power being employed").

18. *See* McNabb v. United States, 318 U.S. 332, 340 (1943); Daye v. Attorney Gen., 712 F.2d 1566, 1570 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); Beale, *supra* note 17, at 1521. In general, courts will attempt to avoid making constitutional decisions if other grounds are available. *See* Kolender v. Lawson, 461 U.S. 352, 361 n.10 (1983); Burton v. United States, 196 U.S. 283, 295 (1905); Bowman v. Tennessee Valley Auth., 744 F.2d 1207, 1211 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985); Moore v. United States House of Representatives, 733 F.2d 946, 954 n.39 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985); *see also* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (advisable for the Court to avoid "friction of a premature constitutional adjudication"); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (listing rules under which the Court has avoided passing on constitutional questions); Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909) (court may decline to rule on constitutional grounds and base its decision on local or state questions only); Liverpool, N.Y. & Phila. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (courts should not anticipate a question of constitutional law before it is necessary nor formulate rule of constitutional law broader than is required by facts).

19. *See* Smith v. Phillips, 455 U.S. 209, 221 (1982); Chandler v. Florida, 449 U.S. 560, 582-83 (1981); Spencer v. Texas, 385 U.S. 554, 564 (1967); McNabb v. United States, 318 U.S. 332, 340 (1943); Lacy v. Gabriel, 732 F.2d 7, 12 (1st Cir.), *cert. denied*, 105 S. Ct. 195 (1984); Daye v. Attorney Gen., 712 F.2d 1566, 1571 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir.), *cert. denied*, 444 U.S. 936 (1979); United States *ex rel.* Gentry v. Circuit Court, 586 F.2d 1142, 1146 (7th Cir. 1978). This dual standard is evidenced by comparing *Davis* with a case decided by the same circuit approximately six weeks later, United States v. Stephens, 486 F.2d 915 (9th Cir. 1973). In Stephens' trial the judge said that the defendant was guilty; the Ninth Circuit, distinguishing *Davis* and *Gonsior*, and relying on *Murdock*, reversed the conviction on the basis of its supervisory power. *See id.* at 916-18. In Davis' trial the state judge made a similar guilty statement, yet the conviction was not overturned. Davis v. Craven, 485 F.2d 1138, 1142 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974).

20. *See* McNabb v. United States, 318 U.S. 332, 340 (1943); Daye v. Attorney Gen., 712 F.2d 1566, 1571 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); Davis v. Craven, 485 F.2d 1138, 1140 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974).

21. *See* Patterson v. New York, 432 U.S. 197, 201 (1977) ("we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"); Burgett v. Texas, 389 U.S. 109, 113-14 (1967) ("States are free to provide such [criminal] procedures as they choose . . . provided that none of them infringes a guarantee in the Federal Constitution."); Spencer v. Texas, 385 U.S. 554, 564 (1967) ("[I]t has never been thought that . . . this Court [is] a rule-making organ for the promulgation of state rules of criminal procedure."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (A state is free to regulate its courts' procedure as long as it does not offend a fundamental principle of justice. The Court will not find that a rule violates the fourteenth amendment merely "because another method may seem . . . fairer or wiser.").

prompted the Seventh Circuit in *Murdock* to reverse on the basis of its supervisory power. In light of this understandable caution and in view of the close division of the Ninth Circuit judges in *Davis*, it appears, as the Second Circuit has noted, that "reasonable judicial minds may . . . differ"[22] as to whether *Murdock* states a constitutional principle.

Part I of this Note argues that when a judge tells the jury that he believes the defendant is guilty—makes a "guilty statement"—or acts in such a way that it is clear to the jury that this is his belief—makes a "guilty indication"—the defendant's right to a fair trial, guaranteed by the sixth amendment and applied to the states through the due process clause of the fourteenth amendment, has been violated. Part II concludes that such a violation is therefore a proper ground for habeas corpus relief. In addition, it is suggested that because this action goes to the integrity of the trial process, it should be considered sufficient error to warrant per se reversal and a new trial. A rule of automatic reversal is necessary because of the trial judge's strong influence over the jury, the great likelihood of prejudice, the difficulty of retrospectively weighing this prejudice and the fact that no other remedy will effectively deter this type of judicial misconduct.

I. INDICATION OF A TRIAL JUDGE'S BELIEF IN THE DEFENDANT'S GUILT IS CONSTITUTIONAL ERROR

A. *The Right to a Fair Trial*

The sixth amendment guarantees criminal defendants the right to a speedy and public trial by an impartial jury.[23] It has been held that the Constitution confers on all criminal defendants the right to a fair trial.[24] The Supreme Court has held that the "atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."[25] Violation of the right to a fair trial is also a denial of the right to due process guaranteed by the fifth amendment[26] and applied to the states through the fourteenth amendment.[27] The

22. Daye v. Attorney Gen., 712 F.2d 1566, 1571 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984).

23. *See* U.S. Const. amend. VI.

24. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 134 (1982); Ponzi v. Fessenden, 258 U.S. 254, 260 (1922); United States v. Hill, 332 F.2d 105, 106 (7th Cir. 1964); Gomila v. United States, 146 F.2d 372, 373-74 (5th Cir. 1944); Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir.), *cert. denied*, 317 U.S. 681 (1942); Miller v. United States, 120 F.2d 968, 973 (10th Cir. 1941); Thacker v. Cox, 309 F. Supp. 101, 103 (E.D. Va. 1970); Sun Co. v. Superior Court, 29 Cal. App. 3d 815, 822, 105 Cal. Rptr. 873, 878 (1973).

25. Estes v. Texas, 381 U.S. 532, 540 (1965); *accord* Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir.) ("There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial."), *cert. denied*, 317 U.S. 681 (1942).

26. U.S. Const. amend. V.

27. *Id.* amend. XIV, § 1; *see* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Massey v. Moore, 348 U.S. 105, 108 (1954); Kennedy v. Cardwell, 487 F.2d 101, 104 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); Lane v.

Supreme Court has operated under the premise that the due process clause ensures fundamental fairness in a criminal trial and that the fourteenth amendment protects against state criminal trials that disregard fundamental fairness.[28]

In essence, these constitutional guarantees help ensure that the structural elements of a trial and appeal comport with principles of fundamental fairness. These elements cannot be skewed to tip the crucial balance of impartiality to prejudice the accused. Such structural imbalances have occurred, for example, in cases in which a judge has a pecuniary interest in convicting the accused,[29] a defendant has been denied the effective assistance of counsel,[30] an indigent defendant was denied transcripts to be used in making his appeal,[31] extensive pretrial publicity has occurred[32] or a judge has commented on the defendant's failure to protest his innocence after arrest.[33] These imbalances have been found to violate the defendant's constitutional right to an impartial trial.[34] Thus, the Supreme Court has indicated that the Constitution requires certain actors to be present during a trial, each playing, to the best of his or her ability, an important and strictly circumscribed role.

A fair tribunal is an essential element of due process necessary to guarantee a fair trial.[35] If the trial judge acts improperly, thus infringing the defendant's right to a fair trial, there is no one who can adequately rectify the imbalance at trial. The trial judge has the primary responsibility to ensure that the trial is fair;[36] it is therefore essential that he be and appear

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Warden, 320 F.2d 179, 186-87 (4th Cir. 1963); Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir.), *cert. denied*, 317 U.S. 681 (1942).

28. *See* Spencer v. Texas, 385 U.S. 554, 563-64 (1967); Lisenba v. California, 314 U.S. 219, 236 (1941); *see also* Lyons v. Oklahoma, 322 U.S. 596, 605 (1944) (fair trial cannot be based on coerced confession).

29. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927); Brown v. Vance, 637 F.2d 272, 282-83 (5th Cir. 1981).

30. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

31. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189, 198 (1971); Draper v. Washington, 372 U.S. 487, 495-500 (1963); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956) (plurality opinion of Black, J.).

32. *See, e.g.*, Groppi v. Wisconsin, 400 U.S. 505, 508-12 (1971); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Irvin v. Dowd, 366 U.S. 717, 725-29 (1961).

33. *See* Hawkins v. LeFevre, 758 F.2d 866, 869-70 (2d Cir. 1985). Although the case was tried without a jury, the court of appeals held that it was no longer reasonable to "indulge in the comfortable fiction" that judges can totally disregard improper evidence, finding that such evidence contributed to the verdict and that therefore the conviction was in violation of due process. *Id.* at 878.

34. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 335 (1966); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion of Black, J.); Tumey v. Ohio, 273 U.S. 510, 523 (1927); Hawkins v. LeFevre, 758 F.2d 866, 876-77 (2d Cir. 1985).

35. *See* Estes v. Texas, 381 U.S. 532, 543 (1965); *In re* Murchison, 349 U.S. 133, 136 (1955); Daye v. Attorney Gen., 696 F.2d 186, 196 (2d Cir. 1982) (en banc), *on remand*, 712 F.2d 1566 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); Staton v. Mayes, 552 F.2d 908, 913 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977).

36. *See* Geders v. United States, 425 U.S. 80, 87 (1976) ("[i]f truth and fairness are

impartial and neutral.[37] Although a judge has the power to question witnesses,[38] sum up the evidence,[39] and, in federal court and in some states, comment on the evidence,[40] he should use this power in such a way as to appear impartial, dispassionate and non-argumentative.[41] The judge's words and actions are accorded great deference by the jury and may "carry an authority bordering on the irrefutable."[42] He is the "symbol of

not to be sacrificed, the judge must exert substantial control over the proceedings"); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("trial courts must take strong measures to ensure that the balance [of fairness] is never weighed against the accused"); United States v. Clardy, 540 F.2d 439, 442-43 (9th Cir.) ("incumbent upon the court to strive to preserve impartiality"), *cert. denied*, 429 U.S. 963 (1976); United States v. Columbia Broadcasting Sys., 497 F.2d 102, 104 (5th Cir. 1974) ("heavy obligation rests on trial judges to effectuate the fair-trial guarantee of the Sixth Amendment").

37. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980); Quercia v. United States, 289 U.S. 466, 470-71 (1933); Hawkins v. LeFevre, 758 F.2d 866, 875 (2d Cir. 1985); Anderson v. Warden, 696 F.2d 296, 299 (4th Cir. 1982) (en banc), *cert. denied*, 462 U.S. 1111 (1983); United States v. Frazier, 584 F.2d 790, 794 (6th Cir. 1978); D. Wilkes, *supra* note 13, § 8-10, at 133.

38. *See* Fed. R. Evid. 614(b) (court's power to interrogate witnesses); McCormick on Evidence § 8, at 15 (E. Cleary ed. 1984) (under case law and federal rules, judge may examine witnesses); 3 Wigmore on Evidence § 784, at 188-99, (Chadbourn rev. ed. 1970 & Supp. 1984) (contains exhaustive list of federal and state cases and statutes).

39. *See, e.g.*, United States v. Murdock, 290 U.S. 389, 394 (1933); Quercia v. United States, 289 U.S. 466, 469 (1933); Starr v. United States, 153 U.S. 614, 624-25 (1894); United States v. Levy, 578 F.2d 896, 902 (2d Cir. 1978); United States v. Tourine, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); United States v. Kahaner, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); Minner v. United States, 57 F.2d 506, 513 (10th Cir. 1932); People v. Culhane, 45 N.Y.2d 757, 758, 380 N.E.2d 315, 316, 408 N.Y.S.2d 489, 491 (per curiam), *cert. denied*, 439 U.S. 1047 (1978); State v. Horner, 310 N.C. 274, 283, 311 S.E.2d 281, 286-87 (1984); Commonwealth v. Vernille, 275 Pa. Super. 263, 270, 418 A.2d 713, 716-17 (1980); N.Y. Crim. Proc. Law § 300.10(2) (McKinney 1982); N.C. Gen. Stat. § 15A-1232 (1983).

40. *See, e.g.*, United States v. Murdock, 290 U.S. 389, 394 (1933); Commonwealth v. Vernille, 275 Pa. Super. 263, 270, 418 A.2d 713, 717 (1980); Cal. Const. art. VI, § 10; Conn Gen. Stat. Ann. § 52-216 (West Supp. 1984); Mich. Comp. Laws. Ann. § 768.29 (West 1982).

41. *See* Sadler v. United States, 303 F.2d 664, 666 (10th Cir. 1962); Minner v. United States, 57 F.2d 506, 513 (10th Cir. 1932); *see also* State v. Schoenbneelt, 171 Conn. 119, 124-25, 368 A.2d 117, 120 (1976) (judge's charge must be fair and reasonable). See *supra* note 37.

42. 3 C. Wright, Federal Practice and Procedure § 555, at 298 (2d ed. 1982); *see* Carter v. Kentucky, 450 U.S. 288, 302 & n.20 (1981) (strong influence of the trial judge); Starr v. United States, 153 U.S. 614, 626 (1894) ("the influence of the trial judge on the jury is necessarily and properly of great weight, and . . . his lightest word or intimation is received with deference, and may prove controlling"); Hicks v. United States, 150 U.S. 442, 452 (1893) (jury gives great weight to judge's words); Perricone v. Kansas City S. Ry. Co., 704 F.2d 1376, 1378 (5th Cir. 1983) ("The trial judge is a potent figure indeed. His instructions are lethal."); United States v. Parodi, 703 F.2d 768, 775 (4th Cir. 1983) (the trial judge must always remember that he occupies " 'a position of preeminence and special persuasiveness' ") (quoting Pollard v. Fennell, 400 F.2d 421, 424 (4th Cir. 1968)); State v. Bunton, 312 Mo. 655, 665, 280 S.W. 1040, 1043 (1926) (" 'It must be remembered that jurors watch courts closely, and place great reliance on what a trial judge says and does . . . . Every remark dropped by the court, every act done by him during the progress of the trial, is the subject of comment and conclusion by jurymen.' ") (quoting State v. Allen, 100 Iowa 7, 12-13, 69 N.W. 274, 275 (1896)); State v. Wendel, 532 S.W.2d 838, 840 (Mo. Ct. App. 1975) (The jury pays very close attention to the trial

even-handed justice,"[43] and his bias, or even the appearance of bias, casts suspicion on the trial process and can lead to a due process violation.[44] Because of this position of preeminence, a federal judge generally should not indicate his belief in the guilt of the defendant, nor should his actions give the jury the impression that he has such a belief.[45]

Possibly the most extreme example of bias concerned a procedure in the District Court of the Commonwealth of Puerto Rico requiring the judge in a bench trial to act also as the prosecutor, when the Commonwealth did not provide one.[46] The First Circuit held that the practice was inherently unfair.[47] It did not satisfy the appearance of justice, and provided the judge with the temptation to skew the balance between the state and the accused.[48] Because a judge is generally considered to be better able than a jury to disregard prejudicial actions,[49] it is difficult to

judge.); State v. Head, 24 N.C. App. 564, 565, 211 S.E.2d 534, 535 (1975) ("It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence . . . will always have great weight with a jury."); R. Traynor, The Riddle of Harmless Error 72 (1970) ("When judicial comment has exceeded fair guidance and attempted to lead the jury to a particular verdict, the comment carries a high risk that it influenced the jury."); L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. 208, 222 (judge's instructions have great effect on juries); Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. Crim. L. & Criminology 68, 71 (1980) (same).

43. United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

44. *See In re* Murchison, 349 U.S. 133, 136 (1955); Daye v. Attorney Gen., 696 F.2d 186, 197 (2d Cir. 1982) (en banc), *on remand*, 712 F.2d 1566 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161, 1169 (D.N.J. 1976), *appeal dismissed*, 430 U.S. 951 (1977).

45. *See, e.g.*, United States v. Robinson, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981); United States v. Middlebrooks, 618 F.2d 273, 277 (5th Cir.), *modified in part on other grounds*, 624 F.2d 36 (5th Cir.), *cert. denied*, 449 U.S. 984 (1980). This proposition may be subject to the dictum in *Murdock* that such comment by a judge does not warrant reversal when the evidence of guilt is overwhelming. *See* United States v. Murdock, 290 U.S. 389, 394 (1933). See *supra* note 7. It is the position of this Note that even in such cases, judicial comment of this type should be sufficiently prejudicial to warrant per se reversal. See *infra* Pt. II.B.

46. *See* Figueroa Ruiz v. Delgado, 359 F.2d 718, 719-20 (1st Cir. 1966).

47. *See id.* at 721-22.

48. *See id.*

49. Rules of evidence that provide for a general exclusion of prejudicial evidence, *see, e.g.*, Fed. R. Evid. 403; Fla. Stat. Ann. § 90.403 (West 1979); S.D. Codified Laws Ann. § 19-12-3 (1978); Vt. R. Evid. 403, are designed to protect jurors from the effects of prejudicial evidence. *See, e.g.*, United States v. Schiff, 612 F.2d 73, 80 (2d Cir. 1979); United States v. Kopel, 552 F.2d 1265, 1270 (7th Cir.), *cert. denied*, 434 U.S. 970 (1977); United States v. Kearney, 420 F.2d 170, 174 (D.C. Cir. 1969); United States v. Antonelli Fireworks Co., 155 F.2d 631, 652-53 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946); Fed. R. Evid. 403 advisory committee note. In light of judicial experience and knowledge of the law, however, in nonjury trials this concern for prejudice is considered to be of lesser importance. *See* Hawkins v. LeFevre, 758 F.2d 866, 878 (2d Cir. 1985) (presumption that judges consider only relevant evidence); *Antonelli Fireworks*, 155 F.2d at 653 (Frank, J., dissenting) (departures from normal evidence rules not usually error when judge sits without jury); Clark v. United States, 61 F.2d 695, 708 (8th Cir. 1932) (presumption in nonjury trial that the judge "acts only upon the basis of proper evidence"), *aff'd*, 289 U.S. 1 (1933); Foster v. Continental Casualty Co., 141 Ga. App. 415, 418, 233 S.E.2d 492, 495 (1977) (presumption in nonjury trial that judge can

imagine that such a practice would be allowed before a jury. As Judge Lumbard of the Second Circuit stated in a recent guilty indication case, even in a trial in which both sides are represented by counsel the judge cannot act as an arm of the prosecution.[50]

It has been held to be improper for the judge to indicate to the jury that he believes that the defendant is lying.[51] In *Quercia v. United States*,[52] the Supreme Court reversed a conviction on the ground that the judge should not have added to the evidence or commented in any way that would be "likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence."[53] In one state, it was held to be reversible prejudice when the judge stated in open court that the accused should not be allowed near a knife that had been admitted into evidence as the weapon used in the charged crime.[54] In California, a provision in the state constitution that allows judges to "comment on the evidence and testimony"[55] has recently been construed to prohibit statements similar to those allowed in *Davis* because they interfere with the jurors' ability to "freely perform their fact-finding responsibility."[56]

A judge can take many steps to remain impartial and avoid infecting the trial process. At the most basic level, he should stay within the role

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sift " 'the wheat from the chaff' " (quoting Dowling v. Jones-Logan Co., 123 Ga. App. 380, 382, 181 S.E.2d 75, 77 (1971)); Pike v. Pike, 609 S.W.2d 397, 403 (Mo. 1980) (en banc) (In nonjury trial "it is assumed the trial judge will not give weight to incompetent evidence"); Vail v. Vermont Mut. Fire Ins. Co., 14 N.C. App. 726, 729, 189 S.E.2d 527, 529 (1972) (in nonjury trial, usual evidence rules are relaxed because "judge, being knowledegeable of the law, is able to eliminate incompetent and immaterial testimony"); C. McCormick, *supra* note 38, § 60, at 153 (judge's professional experience lessens need for exclusionary rules of evidence in nonjury trials). *See generally* Davis, *Hearsay in Nonjury Trials*, 83 Harv. L. Rev. 1362 (1970) (arguing for less strict rules of evidence in nonjury trials).

50. *See* Daye v. Attorney Gen., 663 F.2d 1155, 1173 (2d Cir. 1981) (Lumbard, J., dissenting), *vacated*, 696 F.2d 186 (2d Cir. 1982) (en banc), *on remand*, 712 F.2d 1566 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 723 (1984); *accord* United States v. Singer, 710 F.2d 431, 436-37 (8th Cir. 1983) (en banc); Lopez v. Vanderwater, 620 F.2d 1229, 1235-36 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980); People v. Cruz, 100 A.D.2d 518, 518, 473 N.Y.S.2d 21, 22 (1984) (mem.).

51. In Quercia v. United States, 289 U.S. 466 (1933), the judge stated to the jury, after his general instructions, that the defendant " 'wiped his hands during his testimony. It is a rather a curious thing, but that is almost always an indication of lying . . . . I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.' " *Id.* at 468. The Court reversed the conviction. *Id.* at 472. *See* United States v. Anton, 597 F.2d 371, 375 (3d Cir. 1979); United States v. Hoker, 483 F.2d 359, 368 (5th Cir. 1973).

52. 289 U.S. 466 (1933).

53. *Id.* at 471-72.

54. *See* State v. Wendel, 532 S.W.2d 838, 839-40 (Mo. Ct. App. 1975). The judge stated "in the presence and hearing of the jury . . . '[s]tep over here with the knife, don't leave that there. Look, I don't want that exhibit left anywhere where this man can get to it.' " *Id.* at 839.

55. Cal. Const. art. VI, § 10.

56. People v. Cook, 33 Cal. 3d 400, 413, 658 P.2d 86, 94, 189 Cal. Rptr. 159, 167 (1983) (en banc).

of moderator and avoid taking decisions on factual issues away from the jury.[57] When charging the jury, the judge violates due process if he appears to be clearly partial to the prosecution.[58] This is in accord with the general principle that there can be no directed verdict of guilty in a criminal case.[59]

The American Bar Association has developed guidelines and recommendations for the administration of criminal justice in a fair, balanced and constitutional manner.[60] Standard 15-3.8(a) directly addresses the type of judicial conduct at issue in this Note and concludes that the "[t]he trial judge should not express or otherwise indicate to the jury his or her personal opinion whether the defendant is guilty."[61] The commentary to this section notes that it is difficult to see how such a statement would not be prejudicial because it disparages the basic presumption of innocence.[62] This presumption has been held to be required by the Constitution.[63]

Other court officers have been found to have significant influence on the jury. In *Parker v. Gladden*,[64] the Supreme Court found a violation of due process when a bailiff uttered a guilty statement to members of the jury that he was shepherding.[65] The holding was based on the official character of the bailiff and the obvious weight that such a statement

57. *See* Sandstrom v. Montana, 442 U.S. 510, 522-23 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978); United States v. Murdock, 290 U.S. 389, 394 (1933); People v. Cook, 33 Cal. 3d 400, 413, 658 P.2d 86, 94, 189 Cal. Rptr. 159, 167 (1983) (en banc); Pendergrast v. United States, 332 A.2d 919, 926 (D.C. 1975); Commonwealth v. Rodriguez, 6 Mass. App. Ct. 738, 742-43, 383 N.E.2d 851, 856 (1978), *rev'd on other grounds*, 378 Mass. 296, 391 N.E.2d 889 (1979); People v. Leahy, 60 A.D.2d 558, 558, 400 N.Y.S.2d 342, 342 (1977) (mem.); Commonwealth v. Tyler, 495 Pa. 662, 667, 435 A.2d 1212, 1215 (1981); 3 C. Wright, *supra* note 42, § 555, at 298.

58. *See* Hickory v. United States, 160 U.S. 408, 423 (1896). See *supra* note 37 and accompanying text.

59. *See* United Bhd. of Carpenters v. United States, 330 U.S. 395, 408 (1947); United States v. Musgrave, 444 F.2d 755, 762 (5th Cir. 1971), *cert. denied*, 414 U.S. 1023 (1973); Roe v. United States, 287 F.2d 435, 440 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961); Konda v. United States, 166 F. 91, 93 (7th Cir. 1908); Commonwealth v. Gallison, 384 Mass. 184, 193 n.5, 425 N.E.2d 276, 281 n.5 (1981); State v. Schock, 58 N.D. 340, 342, 226 N.W. 525, 526 (1929); *see also* Fed. R. Crim. P. 29(a) ("Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place.").

60. *See* 1 ABA Standards for Criminal Justice xx (2d ed. 1980).

61. 3 ABA Standards for Criminal Justice 15-3.8(a), at 15-113 (2d ed. 1980). A virtually identical draft provision was cited with approval in United States v. Smith, 399 F.2d 896, 899 n.1 (6th Cir. 1968).

62. 3 ABA Standards for Criminal Justice 15-3.8 commentary, at 15.114 (2d ed. 1980). For a discussion of federal cases concerning the trial judge's disparagement of the defendant, see Annot., 34 A.L.R.3d 1313 (1970).

63. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 485-86 & n.13 (1978) (although not specifically mandated in the Constitution, presumption of innocence is required by due process as a fundamental element of a fair trial); Estelle v. Williams, 425 U.S. 501, 503 (1976) (same); *In re* Winship, 397 U.S. 359, 361-64 (1970) (holding that due process requires proof of guilt beyond a reasonable doubt).

64. 385 U.S. 363 (1966) (per curiam).

65. *Id.* at 363-66 (The bailiff stated: "Oh that wicked fellow . . . he is guilty.").

would carry with the jury.[66] It seems logical to conclude that because a judge's position seems even more "official" than a bailiff's, a guilty statement from the bench would be considered to be even more influential than one from a bailiff. Yet the majority in *Davis* refused to follow *Parker*, distinguishing the two cases on the ground that the judge is charged with assessing the evidence for the jury and the bailiff is not.[67] This distinction is specious. It is certainly true that the two roles are different, but the essential similarity is that neither the judge nor the bailiff is supposed to influence the jury. *Parker* should not be read so narrowly; it is based on a denial of fundamental fairness resulting from sixth amendment violations[68] and not merely on the grounds inferred by the Ninth Circuit. Moreover, the *Davis* court appeared to be incorrect in asserting that *Parker* is not based on constitutional norms; the holding in *Parker* was in fact based on due process grounds.[69] It is not unreasonable to agree with the dissenters in *Davis* who believed that the judge's guilty statement was "at least much of a threat to the fairness of the trial as were the judicial errors . . . which were found to be constitutionally fatal in such cases as [*Parker*]."[70]

When the jury has been influenced by the judge, bailiff or any factor other than the evidence, or even when there is substantial risk of such influence, the dynamics of the trial are no longer fair. There are many such circumstances that can cause the proceedings to become impermissibly biased against the defendant. For example, it is normally improper for a defendant to be tried in a prison uniform[71] or, unless security has

66. *See id.* at 365.

67. *See* Davis v. Craven, 485 F.2d 1138, 1141 (9th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 933 (1974). The court also pointed out that the bailiff's statement was not subject to confrontation, cross examination or other trial safeguards, whereas the judge's statement was made in open court and contained a curative instruction. *See id.* It is difficult, however, to see how the trial judge's statement in *Davis* could have been subject to such safeguards; the judge is not cross-examined, for example. This distinction therefore seems to be of questionable merit. With respect to the judge's use of a curative instruction, courts have not been consistent in determining whether such an instruction will cure a guilty statement or guilty indication. *Compare id.* at 1142 ("[T]he trial judge made it clear to the jury that [his statement] was only a comment, that it was up to the jury to come to its own conclusion, and that the jury was entirely at liberty to disregard the comment.") *with* United States v. Hickman, 592 F.2d 931, 936 (6th Cir. 1979) ("[W]e are persuaded that the district court's instructions to the jury could not offset the effects of his conduct."); *see also* R. Traynor, *supra* note 42, at 72 (a curative instruction "may not counteract the force of comment attended by the authority of the judge's office"). It is the position of this Note that the importance of the judge's position means that an instruction attempting to cure a guilty statement will probably be ineffective. See *supra* notes 42-44 and accompanying text.

68. *See* Parker v. Gladden, 385 U.S. 363, 364-65 (1966) (per curiam) (denial of the sixth amendment rights to an impartial jury, confrontation, cross-examination and counsel).

69. *See id.*

70. Davis v. Craven, 485 F.2d 1138, 1142 (9th Cir. 1973) (en banc) (Goodwin, J., dissenting), *cert. denied*, 417 U.S. 933 (1974).

71. *See* Estelle v. Williams, 425 U.S. 501, 504-06 (1976); 3 ABA Standards for Criminal Justice 15-3.1(b), at 15-78 (2d ed. 1980).

been shown to be a significant concern, in shackles.[72] This is because there is a risk that the jury will be subtly influenced into believing that the defendant is guilty or a "bad man."[73] Such precautions are in accord with the idea that a verdict should be rendered on the evidence brought out at trial and not on the basis of extraneous factors.[74] Prohibiting prison uniforms or shackles while permitting guilty statements and guilty indications excludes subtle influences while permitting the most prejudicial ones to flourish.

One of the goals of the criminal justice system is to bolster public confidence in the trial process.[75] Judges who appear biased erode this confidence because their statments or indications fly in the face of traditional notions of impartiality.[76] The enunciation of a coherent constitutional prohibition of the manifestation of bias through guilty statements or guilty indications would deter judges from such behavior. Other deterrents, such as impeachment, removal from office, or sanctions by local bar associations, are rarely used due to their harshness.[77] Generally, reversals based on aberrant behavior would better effectuate the policy of protecting a defendant's right to a fair trial than would the discipline of

72. *See* Brewster v. Bordenkircher, 745 F.2d 913, 914-16 (4th Cir. 1984); United States v. Samuel, 431 F.2d 610, 614-15 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); Odell v. Hudspeth, 189 F.2d 300, 302 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951); 3 ABA Standards for Criminal Justice 15-3.1(c), at 15-78 (2d ed. 1980).

73. *See* Estelle v. Williams, 425 U.S. 501, 504-05 (1976); Brewster v. Bordenkircher, 745 F.2d 913, 915 (4th Cir. 1984); United States v. Samuel, 431 F.2d 610, 614-15 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

74. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978); Estelle v. Williams, 425 U.S. 501, 503 (1976).

75. *See In re* Winship, 397 U.S. 358, 364 (1970); *In re* Dellinger, 461 F.2d 389, 395 (7th Cir. 1972); B. Cardozo, The Nature of the Judicial Process 112 (1921); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 746-47 (1973) [hereinafter cited as *Disqualification*]; 1 ABA Standards for Criminal Justice 6-1.3, at 6-10 (2d ed. 1980).

76. *See* Minor v. Harris, 556 F. Supp. 1371, 1389 (S.D.N.Y.), *aff'd without opinion*, 742 F.2d 1430 (2d Cir. 1983). It is apparent from this opinion that the district court judge disapproved strongly of the trial judge's statements, *see id.* at 1386, 1388-89, yet he felt constrained to deny the writ of habeas corpus because of *Davis*, *see id.* at 1386. This case demonstrates clearly the pernicious effects of following the *Davis* interpretation that *Murdock* fails to state a constitutional standard. *See id.* at 1386. Other courts and commentators have noted the deleterious effects of judicial bias. *See, e.g.*, United States v. Zarowitz, 326 F. Supp. 90, 92-93 (C.D. Cal. 1971); United States v. Quattrone, 149 F. Supp. 240, 242-43 (D.D.C. 1957); Altschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 685 (1972); *Disqualification*, *supra* note 75, at 747.

77. *See* Altschuler, *supra* note 76, at 695-96; Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. Crim. L. & Criminology 457, 475 (1983) [hereinafter cited as *Courtroom Misconduct*]; *see also* Freedman, *Removal and Discipline of Federal Judges*, 31 Mercer L. Rev. 681, 685 (1980) (in order to protect judicial independence, impeachment is an extremely difficult method of removal); Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 B.Y.U. L. Rev. 233, 237-38 (impeachment difficult; other remedies rarely used because judges, for social and professional reasons, are reluctant to pass on behavior of other judges).

judges.[78]

B. *Due Process Requires Extending to the States a Prohibition on Guilty Statements and Indications*

Unless what is now considered to be only a federal guideline is extended to the states, there is a substantial risk that a trial that would be considered fundamentally "unfair and unacceptable in federal court [would be] good enough in the state courts."[79] Although the due process clause does not require uniform procedures in state and federal courts,[80] it does require fundamental fairness in the trial process in all courts.[81] This is destroyed when state court judges are permitted to stray from their role as impartial arbiters.

It is basic to the accepted concept of selective incorporation that fundamental provisions of the Bill of Rights apply to the states through the due process clause in the same manner as they apply to the federal government.[82] The states must therefore adhere to any standards that are promulgated to ensure fundamental fairness in a trial.[83] *Duncan v. Louisiana*,[84] the case that determined that the right to a trial by jury was "fundamental to the American scheme of justice,"[85] required the states to meet the federal standard.[86] *Malloy v. Hogan*[87] extended the fifth amendment privilege against self-incrimination to the states, because the privilege is designed to protect the basic fairness of the trial.[88] Justice Brennan, writing for the Court, pointed out that "[i]t would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court."[89]

78. *See* Minor v. Harris, 556 F. Supp. 1371, 1388-89 (S.D.N.Y.), *aff'd mem.* 742 F.2d 1430 (2d Cir. 1983); *Courtroom Misconduct*, *supra* note 77, at 474-75.

79. *See* Daye v. Attorney Gen., 712 F.2d 1566, 1573 (2d Cir. 1983) (Lumbard, J., dissenting), *cert. denied*, 104 S. Ct. 723 (1984).

80. *See* Patterson v. New York, 432 U.S. 197, 201-02 (1977); Bute v. Illinois, 333 U.S. 640, 656 (1948); Carter v. Illinois, 329 U.S. 173, 175 (1946); Britton v. Rogers, 631 F.2d 572, 579 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). See *supra* notes 19-20 and accompanying text.

81. *See* Patterson v. New York, 432 U.S. 197, 201-02 (1977); McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). See *supra* Pt. I.A. and accompanying notes.

82. *See* Williams v. Florida, 399 U.S. 78, 103 (1970); Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968); Malloy v. Hogan, 378 U.S. 1, 10-11 (1964); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937); J. Nowak, R. Rotunda & J. Young, Constitutional Law 454-57 (2d ed. 1983). For a recent discussion of the background, scope and application of selective incorporation, see generally Israel, *Selective Incorporation: Revisited*, 71 Geo. L.J. 253 (1982).

83. See *supra* notes 29-34 and accompanying text.

84. 391 U.S. 145 (1968).

85. *Id.* at 149.

86. *See id.*

87. 378 U.S. 1 (1964).

88. *See id.* at 3-11.

89. *See id.* at 11.

In only rare cases has the Court not extended an important guarantee of trial fairness to the state level. The most notable example of this was *Apodaca v. Oregon*,[90] which held that state courts could permit nonunanimous jury verdicts although federal courts did not.[91] The result in *Apodaca*, however, is a product of a unique voting arrangement in which four dissenters argued that unanimity is fundamental to a fair trial and therefore constitutionally required at both levels,[92] and four justices, joining in a plurality opinion, indicated that although state and federal procedures must meet the same standard, unanimity is not required on either level.[93] Justice Powell, concurring in the judgment, and therefore the "swing vote," believed that unanimity is required in federal courts but not in state courts.[94] Thus eight of the nine justices were in favor of uniform procedures, but they differed on which standard was required.[95]

Thus, if it is recognized in federal court that prevention of bias can best be effectuated by a prohibition on guilty statements and guilty indications,[96] this ban should be extended to state trials. Unlike the *Apodaca* situation, in which policy and empirical arguments may be made for lowering federal standards to eliminate the unanimous jury requirement,[97] when there is the possibility that a jury will be improperly influenced only the strictest standards can protect the accused. When a fundamental imbalance in the trial can occur there must be strong protection, and the federal standard would best ensure the constitutional guarantees of due process and fair trial.

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90. 406 U.S. 404 (1972) (plurality opinion of White, J.).

91. *See id.* at 406.

92. *See id.* at 414-15 (Stewart, J., dissenting); Johnson v. Louisiana, 406 U.S. 356, 382-83 (1972) (Douglas, J., dissenting) (companion case to *Apodaca*; opinion applies to both cases); *id.* at 395-96 (Brennan, J., dissenting) (same); *id.* at 400 (Marshall, J., dissenting) (same).

93. *See Apodaca*, 406 U.S. at 406.

94. *See* Johnson v. Louisiana, 406 U.S. 356, 371 (1972) (Powell, J., concurring) (companion case to *Apodaca*; opinion applies to both cases). Justice Powell argued in favor of the application of a fundamental fairness standard to the jury trial requirements, *see id.* at 373 (Powell, J., concurring), rather than the selective incorporation approach apparently supported by the other eight justices, *see* Israel, *supra* note 82, at 299. The difference between these two approaches to the due process clause is that the fundamental fairness approach determines whether a particular aspect of a Bill of Rights guarantee is fundamental and therefore required of the states; the selective incorporation theory determines whether the *entire* Bill of Rights provision is fundamental—if so, its protection is extended to the states with the same standards that apply to the federal government. *See id.* at 290-92.

95. *See* J. Nowak, R. Rotunda & J. Young, *supra* note 82, at 456 n.43.

96. See *supra* notes 76-78 and accompanying text.

97. *See Apodaca*, 406 U.S. at 410-14.

II. Correcting the Violation of a Defendant's Constitutional Rights When Guilty Statements and Indications are Made

A. *Habeas Corpus is the Proper Remedy*

When a defendant in a state criminal trial is convicted but believes that his constitutional rights have been violated, generally he must first raise his claims in state appellate tribunals and thus exhaust the direct remedies available under state law.[98] Assuming that the exhaustion requirements are met, the aggrieved defendant has various federal remedies. He may sue under the Civil Rights Act for damages for denial of his civil rights,[99] but this will not set aside the conviction. There are two direct federal remedies following decisions of the state court of last resort: appeal[100] or writ of certiorari to the Supreme Court.[101] These remedies, however, are narrowly available to state prisoners.[102] Certiorari is totally discretionary[103] and is rarely granted,[104] and appeal, although theoretically available as of right,[105] has also been limited in scope; such cases are often dismissed or summarily affirmed.[106]

Habeas corpus relief is the most effective and important form of federal post-conviction relief for state prisoners.[107] The scope of the remedy is limited, however, allowing federal courts to hear applications for writs "only on the ground that [the prisoner] is in custody in violation of the

98. *E.g.*, J. Cook, *supra* note 13, § 111, at 259; D. Wilkes, *supra* note 13, § 8-15, at 147; L. Yackle, *supra* note 13, § 52, at 231.

The question of what constitutes proper exhaustion is complex and beyond the scope of this Note. *See generally* J. Cook, *supra* note 13, §§ 111-112 (discussing exhaustion of remedies); D. Wilkes, *supra* note 13, §§ 8-15 to -21 (same); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4264, at 625-56 (1978) (same); L. Yackle, *supra* note 13, §§ 52-69 (same).

99. *See* 42 U.S.C. § 1983 (1982).

100. *See* 28 U.S.C. § 1257(2) (1982).

101. *See id.* § 1257(3).

102. *See* D. Wilkes, *supra* note 13, § 8-2, at 117; L. Yackle, *supra* note 13, § 14, at 71-72.

103. Sup. Ct. R. 17(1); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4004, at 504-26 (1977).

104. *See* D. Wilkes, *supra* note 13, § 8-2, at 117 (Court grants only a few hundred of the thousands of applications for certiorari filed every year); L. Yackle, *supra* note 13, § 14, at 72 (Court chooses to review only cases of national importance, while denying most petitions without comment).

105. *See* J. Nowak, R. Rotunda & J. Young, *supra* note 82, at 35; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra* note 103, § 4003, at 500; Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 88-89 (1959).

106. *See* J. Nowak, R. Rotunda & J. Young, *supra* note 82, at 35; D. Wilkes, *supra* note 13, § 8-2, at 117; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *supra* note 103, § 4003, at 501, § 4014, at 631; L. Yackle, *supra* note 13, § 14, at 72; Hart, *supra* note 105, at 89 & n.13.

107. *See* D. Wilkes, *supra* note 13, § 8-2, at 116; 17 C. Wright, A. Miller & E. Cooper, *supra* note 98, § 4261, at 605; L. Yackle, *supra* note 13, §§ 14-15, at 72-73.

Constitution or laws or treaties of the United States."[108] Because this remedy is available as of right, however, it is more likely to result in review by a federal court than any of the direct remedies discussed above.[109]

Traditionally, the writ of habeas corpus has been used to attack convictions based on jurisdictional defects,[110] but the writ may also issue when fundamental constitutional rights have been violated during the course of the proceedings leading to the conviction.[111] The statute authorizes the writ in cases in which the applicant "did not receive a full, fair, and adequate hearing in the State court proceeding"[112] or when the "applicant was otherwise denied due process of law in the State court proceeding."[113] Thus, errors that infect the integrity of the trial process can be rectified through habeas relief. If, as demonstrated above, guilty statements and indications are violations of the right to a fair trial,[114] habeas corpus should be the proper remedy to correct their prejudicial effect.

Although the recent trend in the courts has been to limit the availability of the habeas corpus remedy,[115] these concerns fail to state a persuasive case against the use of habeas to correct the violation of rights that occurs when judges overstep the bounds of acceptable behavior. The Supreme Court in *Engle v. Isaac*[116] indicated its objections to "[l]iberal allowance of the writ."[117] Although *Engle* dealt with procedural forfeiture of the availability of habeas relief rather than with jurisdictional or substantive issues,[118] the Court's reasons for limiting use of the writ are worth considering. Such consideration is warranted regardless of whether the use of habeas relief in cases of guilty statements is characterized as an extension of the writ's application or, as proposed, as merely a correction of a failure to apply the writ in an area in which it has always

108. 28 U.S.C. § 2254(a) (1982).

109. *See* D. Wilkes, *supra* note 13, § 8-2, at 117.

110. *See* J. Cook, *supra* note 13, § 86, at 201-02; L. Yackle, *supra* note 13, § 89, at 358; *see also* 28 U.S.C. § 2254(d)(4) (1982) (writ will be granted if state court lacked jurisdiction over subject matter or person of the accused).

111. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Mackey v. United States, 401 U.S. 667, 685 (1971) (Harlan, J., concurring in part, dissenting in part); Fay v. Noia, 372 U.S. 391, 401-02 (1963); Brown v. Allen, 344 U.S. 443, 485-86 (1953); *see also* 28 U.S.C. § 2254 (1982) (remedies in federal courts for state prisoners).

112. 28 U.S.C. § 2254(d)(6) (1982).

113. *Id.* § 2254(d)(7).

114. See *supra* part I.A. and accompanying notes.

115. *See* 17 C. Wright, A. Miller & E. Cooper, *supra* note 98, § 4261, at 605; L. Yackle, *supra* note 13, § 21, at 101-06; Soloff, *Litigation And Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 Hofstra L. Rev. 297, 301-02 (1978); *see also* Engle v. Isaac, 456 U.S. 107, 126-29 (1982) (reasons for limiting habeas corpus relief); Wainwright v. Sykes, 433 U.S. 72, 78-81 (1977) (same); Stone v. Powell, 428 U.S. 465, 515-29 (1976) (Brennan, J., dissenting) (arguing against Court's recent limitations on habeas).

116. 456 U.S. 107 (1982).

117. *Id.* at 127.

118. *See id.* at 110.

been used—protection of the right to a fundamentally fair trial.[119]

One of the objections in *Engle* is that use of federal collateral attack on state court convictions undermines usual principles of finality.[120] This requires balancing the interests of finality and fundamental fairness. Although it is arguable that many habeas petitions are frivolous,[121] when the error asserted goes to a basic structural element of the fairness of the trial, vindication of the constitutional right should prevail over considerations of judicial administration.[122]

Engle also suggests that liberal use of the writ degrades the trial process.[123] Liberalized use of habeas to correct basic imbalances, however, would probably lead to greater confidence in the trial process. Although *Engle* foresees trial participants failing to use their full efforts at trial in reliance on the availability of subsequent collateral relief,[124] this criticism

119. *See, e.g.*, Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir.) (denial of a fair and impartial trial . . . renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus"), *cert. denied*, 317 U.S. 681 (1942); Barfield v. Harris, 540 F. Supp. 451, 466 (E.D.N.C. 1982) ("[o]nly 'those errors that are so fundamental that they infect . . . the integrity of the process by which [the] judgment was obtained' should entitle a petitioner to habeas relief") (quoting Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting)), *aff'd*, 719 F.2d 58 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2401 (1984).

120. *See* Engle v. Isaac, 456 U.S. 107, 127 (1982); *see also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (arguing for greater respect for finality); Address by John N. Mitchell, *Restoring the Finality of Justice*, Ala. State Bar Ass'n Annual Banquet (June 25, 1971), *reprinted in* 32 Ala. Law. 367 (1971) (same).

121. *See* Rose v. Lundy, 455 U.S. 509, 547-49 (1982) (Stevens, J., dissenting); Brown v. Allen, 344 U.S. 443, 536-37 (1953) (Jackson, J., concurring); Reply Brief for Petitioner at 12-13, Rose v. Lundy, 455 U.S. 509 (1982), *reprinted in* 13 BNA Law Reprints, no. 2, 149, at 168-69 (1981-82); C. Wright, *supra* note 13, § 53, at 345; 17 C. Wright, A. Miller & E. Cooper, *supra* note 98, § 4261, at 602; Santarelli, *Too Much is Enough*, Trial, May-June 1973, at 40; Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated?*, 21 DePaul L. Rev. 740, 747 (1972).

122. *See* Rose v. Lundy, 455 U.S. 509, 550 (1982) (Stevens, J., dissenting) ("When a person's liberty is at stake . . . there surely is no justification for the creation of needless procedural hurdles."); Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 Cum. L. Rev. 363, 380 (1975) ("Where allegations of deprivations of constitutional rights are present, deprivations which may lead to the total and dehumanizing loss of personal liberty, the benefits conferred by repose are far outweighed by the detrimental effects of mindless adherence to the principle of finality."); Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 25 (1956) (Habeas corpus is important because judicial neatness should be subordinate to "the rights of a human being. . . . The aim which justifies the existence of habeas corpus is . . . that it is better that a guilty man go free than that an innocent one be punished.").

123. *See* Engle v. Isaac, 456 U.S. 107, 127 (1982).

124. *See id.* This is the famous "sandbagging" argument made by the Supreme Court in Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977), in rejecting the rule of Fay v. Noia, 372 U.S. 391, 438 (1963), allowing federal habeas relief to state prisoners absent a deliberate bypass of the state court procedure. The Court in *Wainwright* argued that the "deliberate by-pass" rule would encourage defense lawyers to not raise their constitutional claims and gamble on a not guilty verdict at trial, saving the constitutional claim for a federal habeas court, if necessary. *See Wainwright*, 433 U.S. at 89. This point was vehemently disputed by Justice Brennan, who stated that "no rational lawyer would risk the 'sandbagging.' " *Id.* at 103 (Brennan, J., dissenting). Additionally, the dissent observed

is inapposite to the situation at hand because no one has the ability to control the actions of the trial judge except the judge himself.[125] It is highly unlikely that he would purposely expose his conduct to habeas review. In fact, another objection in *Engle* is that reversals through habeas undermine judicial morale.[126] However, judicial conduct is exactly what must be controlled in situations involving guilty statements and guilty indications; it would be perverse to prohibit reversal for judicial misconduct, or at least poor judgment, in order to "protect" judicial morale.

The final arguments against wide use of habeas relief concern its perceived costs, both to society as a whole and to the federal system.[127] Due to the passage of time and the consequent problems of memory and witness location, the writ of habeas corpus will in practice allow some guilty individuals to go free.[128] Justice Brennan's dissent in *Engle*, however, points out that it is wrong to punish the prisoner because of the costs of the retrial and that it is equally reasonable that the state should bear the costs engendered by its representative's violation of the Constitution.[129] The Court itself has stated that the interests of a criminal defendant are of such magnitude that "our society imposes almost the entire risk of error upon itself."[130] With respect to the financial costs of habeas, the fear of docket congestion in federal courts may be exaggerated: The number of habeas filings is not excessive and their rate of increase is low.[131] In addition, the use of habeas relief to correct guilty statements

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that the *Wainwright* decision gave a lawyer two choices: He could do his job properly by presenting the constitutional claim in state court, which would preserve both appellate and habeas review if the claim were rejected, or he could "sandbag," increasing the risk of conviction and forfeiting all state review of the constitutional claim. In addition the lawyer would have to deceive the habeas court into believing that there was no deliberate bypass. Failure to do so would bar all further review. The belief that lawyers would choose the second option "simply offends common sense." *Id.* at 103 n.5 (Brennan, J., dissenting).

125. Although it is possible for the defense attorney to object and ask for a curative instruction, the judge need not give one if he does not think it necessary. Objection would serve, at a minimum, to preserve the issue for appeal. Even if the instruction is given, its effect is questionable. See *supra* note 67 and accompanying text. It is also possible that an objection in this sort of case could backfire, particularly in trials in which a judge has made numerous guilty statements or indications, because the objections could draw the jury's attention to the judge's objectionable actions. *See* R. Keeton, Trial Tactics and Methods § 4.2, at 167-68 (2d ed. 1973).

126. *See* Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982).

127. *See id.* at 126-28; Stone v. Powell, 428 U.S. 465, 491 & n.31 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); *see also* L. Yackle, *supra* note 13, § 15 (discussing costs of habeas); 17 C. Wright, A. Miller & E. Cooper, *supra* note 98, § 4261, at 600-03 (same); Bator, *supra* note 120, at 451 (same); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 148-49 (1970) (same); Weick, *supra* note 121, at 744-48 (same).

128. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Stone v. Powell, 428 U.S. 465, 490-91 (1976); L. Yackle, *supra* note 13, § 21, at 105; Friendly, *supra* note 127, at 150.

129. *See Engle*, 456 U.S. at 147-48 (Brennan, J., dissenting).

130. Addington v. Texas, 441 U.S. 418, 424 (1979).

131. Although the sheer number of habeas corpus petitions from state prisoners may

should in the long run deter judges from such conduct and ultimately lead to fewer trials requiring collateral review.[132]

The argument advanced in *Engle* that federalism suffers when habeas writs are used to attack state convictions[133] disregards the fact that the Constitution limits state court power in many areas[134] and that habeas relief is exactly the remedy contemplated for the occasional abuse of constitutional rights in a state criminal trial.[135] Thus, when the defendant's fundamental right to a fair trial is violated by the guilty statements or guilty indications of the judge, habeas corpus is the proper remedy.

B. *The Standard of Review*

If guilty statements and guilty indications are errors of constitutional magnitude[136] and may be rectified through issuance of habeas corpus writs,[137] the proper standard of review for the court hearing the habeas petition must be determined. In other words, assuming that the convict's trial has been infected by guilty statements or guilty indications, and assuming that all of the complex pre-issuance procedural hurdles have been

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be large, they do not comprise an inordinately high percentage of all civil filings in United States district courts. Whereas state prisoner filings comprised 10.9% of all civil filings in district courts in the 12-month period ending June 30, 1983, *see* Admin. Office of U.S. Courts, 1983 Annual Report of the Director of the Administrative Office of the United States Courts 123, habeas petitions by state prisoners only accounted for approximately one-third of these petitions (8,532 of 26,421), *id.* at 127, table 21. The number of habeas petitions filed by state prisoners was less than the number of suits filed under labor, Social Security, and civil rights laws, for example, *id.* at 122, table 18. Twice as many of the state prisoner filings concerned civil rights complaints. *Id.* at 127, table 21.

Fears concerning the rate of increase of state habeas petitions may also be exaggerated. From 1978 through 1983 there was a 21.3% increase in habeas filings by state prisoners, while, over the same period there was, for example, a 24.2% increase in civil rights filings by federal prisoners and a remarkable 81.8% increase in civil rights filings by state prisoners. *See id.* The increase in habeas filings by state prisoners in the one-year period 1982-1983 was 5.9%, as compared with 15.4% for mandamus petitions from state prisoners. *Id.* This 5.9% increase can be favorably compared with the rate of increase over the same one-year period for bankruptcy suits (61.3%), Social Security law filings (58.6%), or securities, commodities and exchanges law filings (22.7%). *Id.* at 122, table 18.

It must also be noted that the prison population has risen dramatically—almost doubling in twelve years. The Federal and state prison population was approximately 384,000 on March 31, 1982, and approximately 369,000 on December 31, 1981, compared to approximately 196,000 on December 31, 1970. *See* Admin. Office of U.S. Courts, 1982 Annual Report of the Director of the Administrative Office of the United States Courts 102. It is therefore not surprising that the number of petitions has increased.

132. See *supra* notes 76-78 and accompanying text.

133. *See* Engle v. Isaac, 456 U.S. 107, 128 (1982).

134. *See id.* at 148 (Brennan, J., dissenting).

135. *See* Jackson v. Virginia, 443 U.S. 307, 322 (1979); Brown v. Allen, 344 U.S. 443, 498-501 (1953) (majority opinion of Frankfurter, J.); Hawkins v. LeFevre, 758 F.2d 866, 867 (2d Cir. 1985); *see also* Carroll, *supra* note 122, at 381-82 ("because the federal judiciary exists to identify and protect individual rights, and because federal courts are manned by judges institutionally isolated from collateral pressures, any friction produced by habeas corpus review is bearable.").

136. See *supra* Pt. I.

137. See *supra* Pt. II.A.

overcome,[138] under what circumstances should the writ be issued and the conviction vacated?

Justice Stevens, dissenting in *Rose v. Lundy*,[139] proposed four categories of constitutional error claims, covering the entire spectrum of possibilities: 1) claims that are actually not of constitutional dimensions; 2) constitutional claims that are not of sufficient magnitude to reverse, even on direct review; 3) errors important enough to reverse on direct review, but not on collateral attack; and 4) "errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained."[140] This final category would therefore require collateral relief.[141] Justice Stevens recognized the apparent incongruity in suggesting that there is a class of constitutional error that is not harmless but still is not so egregious as to render the trial fundamentally unfair.[142] He would fit into this category cases in which the Court has found a constitutional right but refused to apply it retroactively,[143] or where counsel failed to raise a timely objection.[144] Justice Stevens indicated that such errors may not in fact be of constitutional dimension.[145]

It has been proposed that the best way to control judicial—as well as prosecutorial—misconduct would be to require, based on the supervisory power, automatic reversal for bad faith violations of known standards of behavior.[146] This policy, although leading to a proper result in most cases, neglects to consider the unavailability of federal supervisory power

138. See *supra* note 98 and accompanying text.

139. 455 U.S. 509 (1982).

140. *Id.* at 543-44 (Stevens, J., dissenting).

141. *See id.* at 544 (Stevens, J., dissenting). Justice Stevens cited three cases that would illustrate this rule of automatic reversal: Moore v. Dempsey, 261 U.S. 86 (1923), in which the trial was dominated by mob violence; Mooney v. Holohan, 294 U.S. 103 (1935), in which the prosecutor knowingly used perjured testimony; and Brown v. Mississippi, 297 U.S. 278 (1936), in which the conviction was based on a brutally extorted confession. *See Rose*, 455 U.S. at 544 & nn.9-11 (Stevens, J., dissenting).

142. *See Rose*, 455 U.S. at 543 n.8. (Stevens, J., dissenting).

143. *Id.* (Stevens, J., dissenting); *see, e.g.*, Michigan v. Payne, 412 U.S. 47, 49 (1973) (rule of North Carolina v. Pearce, 395 U.S. 711 (1969), requiring objective evidence on the record to justify greater sentence imposed after successful appeal not applied retroactively); DeStefano v. Woods, 392 U.S. 631, 632-33 (1968) (per curiam) (right to trial by jury in serious criminal cases and contempts not applied retroactively); Stovall v. Denno, 388 U.S. 293, 297 (1967) (rules requiring presence of counsel at pretrial identification not applied retroactively); Johnson v. New Jersey, 384 U.S. 719, 733 (1966) (interrogation guidelines of Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), not applied retroactively); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 419 (1966) (rule of Griffin v. California, 380 U.S. 609 (1965), forbidding adverse comment on defendant's failure to testify not aplied retroactively); Linkletter v. Walker, 381 U.S. 618, 640 (1965) (exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), not applied retroactively).

144. *Rose*, 455 U.S. at 543 n.8 (Stevens, J., dissenting). *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 124-25 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-88 (1977); Estelle v. Williams, 425 U.S. 501, 508 n.3 (1976).

145. *See Rose*, 455 U.S. at 543 n.8 (Stevens, J., dissenting).

146. *See Courtroom Misconduct*, *supra* note 77, at 470-75.

to overturn state trial verdicts.[147] In addition, the judicial behavior standards themselves cannot apply to the states unless the violations are of constitutional magnitude.[148] Moreover, this proposal for automatic reversal based on supervisory power is too narrow, because it applies only to "bad faith" violations,[149] even though inadvertent violations would often be equally harmful. As previously discussed, the use of supervisory power allows the court to beg the question of constitutionality and may lead to denial of a fair trial in state courts.[150] What is needed instead is a realization that guilty statements and indications belong in the fourth of Justice Stevens' categories and require per se reversal because they fundamentally infect the trial process.

The idea that some constitutional errors require automatic reversal did not originate with Justice Stevens' dissent in *Rose v. Lundy*. In fact, until *Fahy v. Connecticut*[151] in 1963, it had generally been believed that all constitutional error required reversal.[152] In *Fahy* the Supreme Court analyzed an alleged fourth amendment violation and indicated the possibility that the error could be found harmless, although it failed to make this finding under the facts.[153] This left open the question of whether constitutional error could be found harmless. In 1967, the Court in *Chapman v. California*[154] extended the "harmless error" rationale to constitutional errors.[155] But while stating that "there may be some constitutional errors which . . . are so unimportant and insignificant that they may . . . be deemed harmless,"[156] the Court also recognized that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[157] Although the opinion did not indicate any way to distinguish errors requiring per se reversal from those that

147. See *supra* notes 17-19 and accompanying text.

148. See *supra* note 20 and accompanying text.

149. *See Courtroom Misconduct, supra* note 77, at 470-75.

150. See *supra* notes 17-18 and accompanying text.

151. 375 U.S. 85 (1963).

152. *See* Chapman v. California, 386 U.S. 18, 42-44 (1967) (Stewart, J., concurring) (disputing Court's institution of a harmless constitutional error rule); Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) (if error is harmless, verdict should stand "except perhaps where the departure is from a constitutional norm or a specific command of Congress"); *Courtroom Misconduct, supra* note 77, at 460-61 (not until *Fahy* did Court indicate possibility of harmless constitutional error). The only prior case in which the Court had found constitutional error harmless was Motes v. United States, 178 U.S. 458 (1900), which involved testimony introduced at trial in violation of the defendant's sixth amendment right of confrontation. *See id.* at 471. The error was held harmless because Motes admitted his guilt at the trial. *See id.* at 475-76; *see also* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Search of a Rationale*, 125 U. Pa. L. Rev. 15, 15 & n.2. (1976) (discussing *Motes*).

153. *See Fahy*, 375 U.S. at 86. The Court found that the error was in fact prejudicial and therefore not harmless. *See id.* at 91-92.

154. 386 U.S. 18 (1967).

155. *Id.* at 21-22, 24 (reviewing court must satisfy itself that the constitutional error was "harmless beyond a reasonable doubt" in order to hold such an error harmless).

156. *Id.* at 22.

157. *Id.* at 23.

could be found harmless, in a footnote it cited three cases as examples of errors requiring per se reversal:[158] *Payne v. Arkansas*, concerning coerced confessions;[159] *Gideon v. Wainwright*, concerning the right to counsel;[160] and *Tumey v. Ohio*, concerning the right to an impartial judge.[161]

Because the Court has not chosen to establish guidelines or specific categories of error that require automatic reversal, it has become necessary to attempt to interpret the significance of the *Chapman* footnote. One commentator, Professor Field, has categorized the three cases cited therein into two types: those especially damaging to the defendant (*Payne*) and "those that infect the entire trial process" (*Gideon* and *Tumey*).[162] Professor Field argues that in light of the Supreme Court decisions that allow a finding in habeas corpus proceedings that overwhelming evidence of guilt can outweigh error,[163] errors especially damaging to the defendant should not require per se reversal.[164] But when the error affects the trial process, automatic reversal would be required in any case, because the verdict itself is suspect.[165] One may similarly categorize the cases cited in Stevens' dissent in *Rose*[166] as examples of situations requiring collateral relief: errors especially damaging to the defendant, such as the brutal extortion of a confession,[167] and errors that infect the entire trial process, such as a trial dominated by mob violence[168] and knowing use by the prosecutor of perjured testimony.[169]

Professor Mause has attempted to classify cases for which automatic reversal would be warranted, not all of which are relevant to this discussion.[170] The first relevant category—inherently prejudicial errors[171]—embraces, among other things, errors that concern the impartiality of the

158. *See id.* at 23 n.8.

159. 356 U.S. 560 (1958).

160. 372 U.S. 335 (1963).

161. 273 U.S. 510 (1927).

162. *See* Field, *supra* note 152, at 29.

163. *See id.* at 30. The "overwhelming evidence" test permits consitutional error to be held harmless when the jury has been presented with "overwhelming evidence of [the] petitioner's guilt." Milton v. Wainwright, 407 U.S. 371, 372-73 (1972); *see also* United States v. Young, 105 S. Ct. 1038, 1049 (1985) (error held harmless due to "overwhelming evidence of . . . intent"); Bumper v. North Carolina, 391 U.S. 543, 558 (1968) (Black, J., dissenting) (error held harmless when "the overwhelming evidence . . . amply demonstrates petitioner's guilt"); Field, *supra* note 152, at 16-36 (discussing "overwhelming evidence" test and arguing against its continued use by the Court).

164. Field, *supra* note 152, at 30.

165. *See id.* at 30-31; *see also* Hawkins v. LeFevre, 758 F.2d 866, 877 (2d Cir. 1985) ("notions of justice require errors that . . . debase the entire judicial process be corrected at all costs, since the trial itself—and hence the judgment—was contaminated").

166. 455 U.S. at 544 nn.9-11 (Stevens, J., dissenting). See *supra* note 141 and accompanying text.

167. Brown v. Mississippi, 297 U.S. 278 (1936).

168. Moore v. Dempsey, 261 U.S. 86 (1923).

169. Mooney v. Holohan, 294 U.S. 103 (1935).

170. *See* Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 Minn. L. Rev. 519, 540 (1969).

171. *See id.* at 540-47.

judge.[172] Professor Mause would include in this category certain questions concerning the admission of evidence,[173] situations in which the judge had a financial interest in the outcome,[174] and cases in which a judge summarily convicted an attorney for contempt following a personal attack without bringing in another judge to take his place.[175] This category is worthy of per se reversal because the preeminent position and persuasiveness of the judge make it nearly impossible for an appellate court to retrospectively determine the effect of judicial bias on the jury.[176]

A second category encompasses errors that inherently have a tendency to undermine the reliability of the guilt-determination process.[177] Automatic reversal is necessary to prevent the "special peril" that exists when the trial process is unreliable.[178] A third category includes errors that undermine public respect for the criminal justice system;[179] such errors should be reversed in order to maintain public confidence in the system.[180] Under any of these classifications, guilty statements and guilty indications qualify for per se reversal as fundamental constitutional errors affecting the balance of fairness in a trial.

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172. *See id.* at 542.

173. In Professor Mause's view these errors may not be reversible error in themselves because these areas are within the discretion of the trial judge. *See id.*

174. *See id.* (citing Tumey v. Ohio, 273 U.S. 510 (1927)). See *supra* note 29.

175. *See* Mause, *supra* note 170, at 542 (citing Offutt v. United States, 348 U.S. 11, 12 (1954)). For other cases on this point, see Mayberry v. Pennsylvania, 400 U.S. 455, 463-66 (1971); Cooke v. United States, 267 U.S. 517, 534 (1925); *In re* Dellinger, 461 F.2d 389, 392-97 (7th Cir. 1972); *see also* Fed. R. Crim. P. 42(b) ("If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing. . . .").

176. *See* Mause, *supra* note 170, at 542; *see also* United States v. Nazzaro, 472 F.2d 302, 304 (2d Cir. 1973) (appellate review of judge's conduct difficult); United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967) (same), *cert. denied*, 400 U.S. 820 (1970); Minor v. Harris, 556 F. Supp. 1371, 1378-79 (S.D.N.Y.) (same), *aff'd mem.*, 742 F.2d 1430 (1983). See *infra* note 181 and accompanying text.

177. *See* Mause, *supra* note 170, at 547-51. This category would include the admission of unreliable evidence, such as involuntary confessions, the denial of the right to counsel, or the presence of a prejudiced judge or jury. *Id.* at 548.

178. *Id.* Professor Mause would exclude from this category violations of Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule), and Miranda v. Arizona, 384 U.S. 436 (1966) (requirement that arrestee be informed of rights), because the rules in those cases exclude reliable evidence in order to deter police conduct. *See* Mause, supra note 170, at 548-49. *See also* Hawkins v. LeFevre, 758 F.2d 866, 877 (2d Cir. 1985) (where trial process contaminated, error must be corrected "at all costs").

179. *See* Mause, *supra* note 170, at 554-56. This category would include any error that implicates the competency or impartiality of the judge or the jury, as well as cases such as Rochin v. California, 342 U.S. 165 (1952), in which a suspect was forced to vomit up evidence. The Court found this to be a constitutional violation because the official misconduct "shock[ed] the conscience" of the Court. *Id.* at 172. *See* Mause, *supra* note 170, at 554-55.

180. Mause, *supra* note 170, at 554.

C. *Practical Considerations*

A final distinction must be drawn between guilty statements and guilty indications. Generally it is obvious when a judge uses a guilty statement. But it is not always apparent when he has made his belief known to the jury without an explicit statement.[181] There are two types of problems that may occur. First, there may be indications that cannot appear in the record for appeal. These would include allegations that the judge's tone of voice, facial expressions or manner indicated his belief in the defendant's guilt.[182] Unfortunately, it is usually beyond the ability of the reviewing court to correct these errors because in most cases it lacks audio or videotapes of the proceedings.[183] The second problem is one of interpretation: When does a judge cross the line of acceptable conduct into an area of reversible error?[184] The uniqueness of each case makes it impossible to establish a precise standard.

The appellate court must make its own determination after examining the totality of the circumstances. If the line has not been crossed, there is no constitutional violation and normal error analysis should proceed. If, however, the reviewing court determines that there has been a denial of due process or the right to a fair trial, automatic reversal would be required. Of course, this case-by-case approach gives substantial discretion to the reviewing court. Nevertheless, the standard of per se reversal

181. *See* United States v. Nazzaro, 472 F.2d 302, 304 (2d Cir. 1973) ("There is simply no handy tool with which to gauge . . . . [a] claim of unfair judicial conduct. [That] requires a close scrutiny of each tile in the mosaic of the trial so that . . . we can make a safe judgment that the defendant was deprived of the fair trial to which he was entitled."); United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967) ("Few claims are more difficult to resolve than the claim that the trial judge . . . has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one."), *cert. denied*, 400 U.S. 820 (1970); Minor v. Harris, 556 F. Supp. 1371, 1378 (S.D.N.Y.) ("Claims that defects in the trial process precluded a fair trial pose difficult problems for constitutional resolution. They require the Court to scrutinize the entire trial to determine whether the resulting conviction violated due process."), *aff'd mem.*, 742 F.2d 1430 (1983).

182. *See, e.g.*, United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); United States v. Weiss, 491 F.2d 460, 467-69 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); United States v. Dellinger, 472 F.2d 340, 387 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

183. *See, e.g.*, Perricone v. Kansas City S. Ry., 704 F.2d 1376, 1378 (5th Cir. 1983) ("[The judge] can communicate his attitude in a thousand ways from a cocked eyebrow to a sideways glance. Those will not be of record. They are not reviewable."); United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982) ("Where a videotape or sound recording of the trial is in the appellate record, it may be used to support the claim that a defendant was denied a fair trial by the trial judge's actions."), *cert. denied*, 462 U.S. 1118 (1983); United States v. Robinson, 635 F.2d 981, 984 n.2 (2d Cir. 1980) ("[I]n the absence of a videotape and sound recording of the trial we have no way of assessing appellants' claims that the trial judge, by his gestures, tone of voice and facial expressions, sought to intimidate counsel, or indicated hostility, belief or disbelief in witnesses or partiality."), *cert. denied*, 451 U.S. 992 (1981); United States v. Weiss, 491 F.2d 460, 468 n.2 (2d Cir.) ("[W]e have no way, absent videotape and sound recording, of appraising appellants' " claims of prejudice.), *cert. denied*, 419 U.S. 833 (1974).

184. See *supra* note 181 and accompanying text.

would send a message to appeals courts to view judicial behavior strictly and to take strong action to deter trial judges from behaving in a biased way. This would ultimately lead to increased fairness in the criminal justice system and the preservation of the defendant's fundamental rights to a fair trial and due process.

CONCLUSION

The use of guilty statements and guilty indications are constitutional error because they violate a defendant's rights to a fair trial and due process. It has been recognized that judges should not use guilty statements and guilty indications and that it is incongruous for a system to ensure fundamental fairness in federal trials but to deny similar protection in state trials. Habeas corpus relief, which is appropriate when a conviction is obtained in violation of the accused's constitutional rights, is the proper remedy for this wrong. Judges' use of guilty statements and indications infect the trial process; reviewing courts should therefore automatically reverse any conviction that occurs after such action. A standard of per se reversal is necessary because of the judge's strong influence over the jury, the great likelihood of prejudice, the difficulty of retrospectively weighing this prejudice, and the ineffectiveness of any other sort of deterrent.

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